Supreme Court, U.S.
FILED
APR 8 1998
OFFICE OF THE CLERK

No. 97-1454

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

ANCHORAGE EDUCATION ASSOCIATION, *et al.*,
Petitioners,

v.

REBECCA PATTERSON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari
United States Court of Appeals
for the Ninth Circuit

BRIEF OF RESPONDENTS REBECCA PATTERSON, *ET AL.*, IN OPPOSITION TO THE PETITION

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April 8, 1998

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

May a federal court require plaintiffs to exhaust their administrative remedies prior to bringing a federal civil rights action pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1988)?

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Supreme Court Rule 15 1

IN THE
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No. 97-1454

ANCHORAGE EDUCATION ASSOCIATION
and NEA-ALASKA, INC.,

Petitioners,

v.

REBECCA L. PATTERSON, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 15, Respondents Rebecca L. Patterson, *et alia* ("the teachers"), oppose the Petition of the Anchorage Education Association ("AEA") and NEA-Alaska, Inc.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Besides the provisions set out in the Petition ("Pet.") at 2, this case raises issues under Article III of the Constitution of the United States. Article III provides in pertinent part:

> **Section 1.** The judicial Power of the United States, shall be vested in one supreme Court, and in such

> such inferior Courts as the Congress may from time to time ordain and establish....
>
> **Section 2.** The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution [and] the Laws of the United States....

This case also raises issues under the Fourteenth Amendment to the Constitution of the United States. It provides in pertinent part:

> **Section 1.** .... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondents Rebecca L. Patterson, *et al.*, initiated this civil rights class action against their monopoly bargaining representative, its state-wide affiliate (collectively, "the unions"), and their public employer and certain officials thereof, to vindicate their First- and Fourteenth-Amendment rights.

The teachers' complaint alleged that the efforts of the unions and the Anchorage School District ("ASD") to enforce their "agency shop" arrangement violated their constitutional rights, because the unions and/or ASD failed to comply with "the constitutional requirements for the ... collection of agency fees," as set forth in *Teachers Local No. 1 v. Hudson*, 475 U.S. 292, 310 (1986).

As relief, the teachers sought restitution of all fees collected or a declaration that those teachers who had refused to pay any fees owed no financial obligation to the unions.

On cross-motions for summary judgment, the district court found that the unions failed to comply with *Hudson*, Appendix

("App.") B at 27a-29a, App. C at 39a-40a and App. E at 60a, and ordered entry of some relief requested by the teachers.[1] It is notable, however, that **not** among the violations alleged was a requirement that the nonmembers exhaust the unions' "impartial decisionmaker" procedure before challenging their fee calculation in federal court. No such requirement was stated or suggested anywhere in Petitioners' notice and procedures.

The district court rejected the teachers' argument that a union notice claiming that constitutionally nonchargeable categories of expenditures are, in fact, chargeable is constitutionally deficient under *Hudson*,[2] and also rejected the teachers'

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[1] Protestations to the contrary notwithstanding, and though correctly conceding that "they are not at issue here," the unions clearly do **not** "accept[ ] the district court's rulings on" the district court's findings that their notice and procedures were constitutionally inadequate, and superfluously expend more than one-third of a page arguing why the district court erred in its findings on this irrelevant issue. Pet. at 4-5, n.4.

[2] *But see Reese v. City of Columbus*, 71 F.3d 619 (6th Cir. 1995), *cert. denied*, — U.S. —, 117 S. Ct. 386 (1996) (deciding issues in challenge to adequacy of union's notice and procedures); *see also Abrams v. Communications Workers*, 59 F.3d 1373, 1380 (D.C. Cir. 1995); *Hohe v. Casey*, 956 F.2d 399, 414, n.8 (3d Cir. 1992); *Tierney v. City of Toledo*, 824 F.2d 1497, 1505-06 (6th Cir. 1987) (procedures for collecting agency-shop fees are "constitutionally deficient under *Hudson*" because the union's "formulation" of the costs that are chargeable was **substantively** erroneous); *Schneider v. Colegio de Abogados*, 917 F.2d 620, 631 (1st Cir. 1991); *Lucid v. City and County of San Francisco*, 774 F. Supp. 1234, 1238 (N.D. Cal. 1991); *Ellis v. Western Airlines*, 652 F. Supp. 938, 940 (S.D. Cal. 1986); *Lehnert v. Ferris Faculty Ass'n*, 707 F. Supp. 1473, 1481-82 (W.D. Mich. 1988) ("the standard for calculating the fee [under a union's collection procedure] must properly define chargeable costs for it to pass constitutional muster under *Hudson*"); *cf. Schneider v. Colegio de Abogados*, 682 F. Supp. 674, 686-87 (D.P.R. 1988), *aff'd in pertinent part*, 917 F.2d at 631 (considering the (continued...)

request for damages, holding that they were not entitled to restitution of all fees collected and/or a declaration that they owed no financial obligation to the unions. App. D at 45a-46a. The district court held that, notwithstanding the unions' failure to comply with "the constitutional requirements for the ... collection of agency fees," *Hudson*, 475 U.S. at 310, they were still entitled to collect some portion of the fees demanded of the teachers.[3]

Rather than adjudicate the appropriate amount of that fee, the district court determined that "the appropriate remedy for this case at this time is to order arbitration." App. C at 46a. The district court entered judgment that the unions' "arbitration" procedures

> must be utilized by employees who wish to challenge the Associations' calculation of chargeable and nonchargeable

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[2] (...continued)
constitutionality under *Hudson* of a rule establishing procedures for the collection of mandatory bar dues; holding that "[p]erhaps the most basic flaw in this arrangement lies in the rule's definition of 'objectionable activities'").

[3] Typical of the self-serving extra-record claims characteristic of their Petition, the unions state that such fees are demanded for AEA affiliates "to pay **for services provided** by NEA-Alaska; and ... to pay **for services provided** by [the National Education Association]." Pet. at 3 (emphasis added). Of course, the last time an NEA-affiliate was before this Court on agency-shop issues, the unions fiercely maintained, and this Court held, that bargaining activities of state and national affiliates were chargeable "even if those activities were not performed for the direct benefit of the objecting employees' bargaining unit." *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 524 (1991). If Petitioners now concede for purposes of the remainder of this litigation that its position as stated to this Court is appropriate and controlling, the teachers will accept it. However, Petitioners' narrow characterization here of their practices does not reflect their actual practices.

> items for the purpose of establishing service fees, [and] [t]hat all issues of chargeability ... including issues raised by plaintiffs herein with regard to litigation expenses, organizational maintenance and lobbying ... shall be determined by an arbitrator to be selected by the American Arbitration Association ["AAA"], through arbitration, and chargeability issues may not be brought to the court for determination until arbitration is completed.

Id. at 60a-61a.

The teachers' appealed to the Ninth Circuit raising, *inter alia*, two issues relevant to the Petition:

* * * *

> 2. Whether the District Court properly denied full restitution and/or relief from the obligation to pay fees to the teachers for violations of their constitutional rights.
>
> 3. Whether the District Court properly designated a nonconsensual, non-Article III judge to adjudicate the teachers' damages, instead concluding that "the arbitration procedures established by [the unions], utilizing the services of the American Arbitration Association ... must be utilized by employees who wish to challenge the Association's calculation of chargeable and nonchargeable items for the purpose of establishing service fees.

Plaintiffs-Appellants/Cross-Appellees' Brief at 3.

The Ninth Circuit reversed the district court's ruling on both questions. First, for the year at issue, "the amount of the agency fee ... lawfully ... chargeable to them" is **zero**,"[b]ecause ... AEA failed to satisfy *Hudson*'s requirements and was not entitled to the fees that it collected"; "Patterson is ... entitled to relief." *Id.* Petitioners have not sought review of this determination.[4]

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[4] Petitioners seriously mischaracterize the nature of the relief (continued...)

As to whether "other relief had to be arbitrated," *id.* at 16a, specifically, the district court's holding that "Patterson had to arbitrate her damages," *id.* at 15a, the Ninth Circuit held that "nonmembers are not required to exhaust union remedies to which they did not agree before challenging the chargeability determinations in federal court." *Id.* at 18a.

REASONS FOR DENYING THE PETITION

Petitioners state that this case presents the same question pending before this Court in *Air Line Pilots Association v. Miller*, No. 97-428 (U.S. Nov. 26, 1997). Pet. at 5. However, substantial differences exist between the cases, and the Ninth Circuit reached a correct conclusion of law required by this Court's jurisprudence. Therefore, the writ should be denied.

I. Petitioners Mischaracterize the Issue Decided By the Lower Court, Which Addressed an Article III Court's Duty To Adjudicate Damages.

This case is not about a nonmember teacher's obligation to exhaust the unions' impartial decisionmaker process. This case is about a court's effort to refer damages calculations to a non-Article III decisionmaker. When this case is viewed in its proper light, then, much of the unions' discussion is rendered decidedly off-topic.

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[4] (...continued)
sought by the teachers, Pet. at 3-5, asserting that "Respondents ... sought to have the district court determine the amount of the agency fee that lawfully was chargeable to them." *Id.* at 3. However, the teachers invoked their right to a federal adjudication of the appropriately chargeable fee calculation only **in lieu of** restitution of fees collected and/or a declaration that the unions were entitled to nothing, owing to the unions' failure to satisfy *Hudson*'s requirements, if the district court adopted the unions' argument and/or declined to order full restitution.

Petitioners err by relegating the core of the Ninth Circuit's decision to footnote status, Pet. at 11 n.9, stating merely that "there is language in the Ninth Circuit's opinion suggesting that what the district court required here was arbitration of respondents' 'damages.'" Such language appears in the Ninth Circuit's decision for very good reason—that is precisely what the district court ordered. App. C at 44a-45a.

Importantly, it did so at **the unions'** urging. They argued below that, in lieu of restitution of all fees demanded and/or collected in the absence of complete compliance with "the constitutional requirements for the ... collection of agency fees," *Hudson*, 475 U.S. at 310, the district court should award "only the nonchargeable portion of the fee." App. C at 45a. The district court's decision was based upon the teachers' request for "a full refund of the escrowed fees," and "[i]n the event that a full refund is not granted, [the teachers] request that this court determine the amount of a refund, rather than assign such a decision to the arbitrator." *Id.*, *citing Railway Clerks v. Allen*, 373 U.S. 113, 119-20 (1963); *Hudson v. Teachers Local No. 1*, 922 F.2d 1306, 1313-15 (7th Cir.), *cert. denied*, 501 U.S. 1230 (1991); *Lowary v. Lexington Local Bd. of Educ.*, 903 F.2d 422, 433-34 (6th Cir. 1990). However, having determined that the teachers were entitled to less than a full refund, the district court abdicated its judicial responsibility and sought to force the teachers to "arbitrate" their damages before the unions' "impartial decisionmaker."

Apparently cognizant of their peril, and desperate to receive dispensation for a "union exception" to normal principles of law, the unions here ignore the actual substance of the decisions below, instead attempting to place the square peg of this case in the round hole of *Miller v. ALPA*, 108 F.3d 1415 (D.C. Cir.), *cert. granted*, No. 97-428 (Nov. 26, 1997), arguing that it is an exhaustion case. Pet. at 5. This characterization is inaccurate.

Nowhere in Petitioners' constitutionally-deficient notice and procedure was an "exhaustion" requirement purported to be imposed. Further, to do so now would impose upon the teach-

ers, as a foregone conclusion, the results of a proceeding in which they did not participate. They had **no legitimate reason** to suspect that those results would be imposed upon them. *But see, Weaver v. University of Cincinnati*, 970 F.2d 1523, 1534-36 (6th Cir.1992), *cert. denied*, 507 U.S. 917 (1993). It is difficult to imagine a more stunning and thorough-going denial of due process.

Moreover, this Court repeatedly has reaffirmed the proposition that the finding of a constitutional violation "impose[s] a duty **on the District Court** to grant appropriate relief," *Hills v. Gautreaux*, 425 U.S. 284, 297 (1976) (emphasis added), since Article III, § 1, "preserves to litigants their interest in an impartial and independent **federal adjudication** of claims within the judicial power of the United States." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850 (1986) (emphasis added); *see also Peretz v. United States*, 501 U.S. 923, 936 (1991) (litigants have "personal right to have an Article III judge preside over a civil trial"); *cf. Farrar v. Hobby*, 506 U.S. 103 (1992); *see also Hudson*, 475 U.S. at 309 n.22 ("The judicial remedy for a proven violation of the law will often include commands the law does not impose on the community at large").[5]

When viewed in the proper light, then, the Ninth Circuit's decision is well within the mainstream of the jurisprudence of both this Court, and of the lower federal courts. No cogent reason is present for granting the writ.

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[5] "[W]hen a plaintiff establishes the violation of [his] right to procedural due process," a court is "obligate[d]" under 42 U.S.C. §1983 "to award nominal damages." *Farrar*, 506 U.S. at 112, *citing Carey v. Piphus*, 435 U.S. 247, 266 (1978). No such award was made by the district court here, obviously because the district court contemplated that a damages award—the nonchargeable portion of the fee—would be adjudicated pursuant to the unions' "arbitration."

In sum, on the actual substance of the decision below, Petitioners make no case for a writ of *certiorari*.

II. The Ninth Circuit Was Faithful To This Court's Precedents, Which Unambiguously Reject Efforts To Force Civil Rights Plaintiffs To Exhaust Their Administrative Remedies.

The Petition narrowly focuses upon decisions issued in the wake of this Court's decision in *Hudson*, 475 U.S. at 301-10, as though there were some sort of "union exception" to normal principles applicable to constitutional claims raised pursuant to 42 U.S.C. § 1983. This Court's decisionmaking does not justify such a distinction. Moreover, the Petition constitutes a naked effort to establish labor unions as a preferred class of litigants granted authority to delay unilaterally and, therefore, deny relief sought by the victims of their constitutional torts.

In light of *Hudson*'s determination, the proposition that the teachers need not exhaust the unions' "impartial decisionmaker" procedure before they may challenge the unions' agency fee in court is not a matter of controversy among the circuits. Therefore, a writ of *certiorari* is inappropriate here.

A. It is a black-letter rule of law that a party can be required to arbitrate a dispute only where there is a contract or other voluntary agreement to do so, or some statutory mandate. *E.g.*, *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 648-49 (1986); *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 374 (1974); *Abrams*, 59 F.3d at 1382 & n.14. The unions concede that the teachers did not contract for, or otherwise agree to, arbitration of their agency-fee dispute.[6]

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[6] For this reason, the unions' characterization of their "impartial (continued...)

Moreover, the teachers are not union members. App. A at 4a. As such, they are "not bound by contract with the union to exhaust any formal internal union appeals before resorting to a judicial forum." *Soto Segarra v. Sea-Land Services, Inc.*, 581 F.2d 291, 295 (1st Cir. 1978); *see Bagnall v. ALPA*, 626 F.2d 336, 341 (4th Cir. 1980), *cert. denied*, 449 U.S. 1125 (1981).[7]

Neither statutory mandate nor voluntary agreement compels exhaustion of administrative remedies. To the contrary, the governing statute, 42 U.S.C. § 1983, precludes imposition of an exhaustion requirement. *See* § I(B), *infra*.

Petitioners concede as much by devoting the bulk of their argument, Pet. at 6-15, to policy arguments why exhaustion should be required.

In large part, Petitioners rely upon their extra-record claims that the virtue of their so-called "arbitration" process is that it "certainly is more 'expedi[tious]' than the judicial process." Pet. at 8-9 & nn. 6 & 9. They neglect to mention that among the reasons why it is so much more "expeditious" are: (1) that teachers testing union chargeability claims typically are denied discovery as a matter of right—typically denied by AAA arbitrators, *see, e.g.*, *Miller*, 108 F.3d at 1417; *Bromley v. Michigan Education Association*, 843 F. Supp. 1147, 1153 (E.D. Mich. 1994), *rev'd*, 82 F.3d 686 (6th Cir. 1996), *cert. denied*, ---

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[6] (...continued)
decisionmaker" process as "arbitration" approaches a fraud upon the Court. While its compliance with *Hudson*'s requirements is not challenged, Pet. at 4 n.2, conceding that point does not establish that the procedure is "arbitration," as that concept normally is understood. Arbitration it is **not**.

[7] AEA's negotiated collective bargaining agreement could not require the **teachers** to arbitrate their disputes with **itself**, as opposed to disputes with their employer. *Food & Commercial Workers Local 951 v. Mulder*, 31 F.3d 365, 368-69 (6th Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995); *Bagnall*, 626 F.2d at 342; *but see Lancaster v. ALPA*, 76 F.3d 1509, 1524-26 (10th Cir. 1996).

U.S. ---, 117 S. Ct. 682 (1997)—available to them only in the federal courts, and necessary to a full and fair adjudication; (2) it is **union** resistance to reasonable discovery requests and to the litigation as a whole that prevents it from being "expeditious." *See Bromley* (litigation first filed in 1992 is still pending); *cf. City of Riverside v. Rivera*, 477 U.S. 561, 580 n.11 (1986) ("Those who elect a militant defense ... must take into account the time and effort they extract from their opponents. It is ... [defendants'] right to contest every aspect of this claim, but they cannot now disclaim the consequences of their actions").[8]

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[8] Petitioners likewise would have this Court conclude, Pet. at 10, *inter alia*, that the undocumented lack of challenges to the results of their so-called "arbitration" process occurs because "objectors often ... find that the arbitrator's decision satisfactorily resolves their objections." Pet. at 10 (citing the self-serving characterization of "the experience of AEA's parent organizations"). Of course, it is equally likely that such individuals acquiesce when union fee calculations are rubberstamped by AAA "arbitrators," as contrasted with the substantial reductions achieved when such questions are litigated before the federal courts, *Lehnert v. Ferris Faculty Ass'n*, 643 F. Supp. 1306, 1334 (W.D. Mich. 1986) (determining after trial that less than 14% of union expenditures were properly chargeable, after an initial union claim that a multiple of that percentage was chargeable); *see also Communications Workers v. Beck*, 487 U.S. 735, 740 (1988), because they lack the resources to bring and maintain complex litigation in the federal courts.

Indeed, the only rational conclusion—given the litigation record of Petitioners' national affiliates and their efforts in this case—is that Petitioners' goal is to guarantee that **no meaningful review** of their chargability claims **ever occur**. This is evident from Petitioners' insistence on characterizing their "impartial decisionmaker" process as "arbitration," thus providing the basis to argue a lesser standard of review. *Bromley*, 843 F. Supp. at 1154, 1156 (giving "great deference to the fact-findings made by the arbitrator"). While Petitioners' desire to first "wear out" challengers, and then to deny meaningful review for those who persist in their challenges by bringing them to court, is understandable in light of the litigation record

(continued...)

The Ninth Circuit was thus correct in its observation that an exhaustion requirement frustrates the teachers' right to a full, fair, **and most importantly, reliable** adjudication of their claims. App. A at 18a. Petitioners' suggestion that such litigation cannot be "expeditious" is akin to the defendant convicted of patricide, who begs for mercy because he is an orphan.

Nevetheless, it is unnecessary here to rebut in detail Petitioners' self-serving characterizations of the purpose of *Hudson*'s prophylactic requirements and their unjustified conclusions regarding nonmembers and *Hudson*-type litigation, for it is noteworthy that Petitioners gloss over the statutory and constitutional context in which this case arises.

B. The proposition that exhaustion of administrative (or internal union) remedies can or should be required in suits pursuant to 42 U.S.C. § 1983 was unanimously rejected by this Court as recently as last term. *Edwards v. Ralisok*, --- U.S. ---, 117 S. Ct. 1584, 1589 (1997) ("a claim either is cognizable under § 1983 and should immediately go forward, or is not cognizable and should be dismissed"); *see also Heck v. Humphrey*, 512 U.S. 477, 481 (1994) (§ 1983 contains no judicially imposed exhaustion requirement). However, these most recent statements hardly were the first time that this Court had occasion to consider this issue, or resoundingly to reject an argument that exhaustion should be required. *Patsy v. Florida Board of Regents*, 457 U.S. 496, 500-01 (1982) ("this Court has stated categorically that exhaustion is not a prerequisite to an action under § 1983"), *and cases cited therein*; *Felder v. Casey*, 487 U.S. 131 (1988).

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[8] (...continued)
of such challenges, *see Lehnert*, 643 F. Supp. at 1334 (reducing chargeable fee to fraction of that initially claimed); *Beck*, 487 U.S. at 740 (same), such self-serving union goals are hardly consonant with Petitioners' duties under the First Amendment and *Hudson*, 475 U.S. at 307 n.20.

Petitioners attempt to avoid *Patsy*'s unambiguous mandate by arguing that *Hudson*'s "impartial decisionmaker" "is not a state administrative remedy; it is a procedure created and governed by federal law, and it is administered by a union, not by state authorities." Pet. at 13. This is a distinction without a difference. In negotiating and enforcing its forced-unionism agreement, a union acts "under color of" state law. *See Felder*, 487 U.S. at 139 ("Section 1983 creates a species of liability in favor of persons deprived of their federal civil rights by those **wielding** state authority") (emphasis added). Nevertheless, we suppose Petitioners fatuously suggest that a process established by unions pursuing their own economic interests are somehow due more deference than state administrative remedies.

Under remarkably similar circumstances, this Court has observed:

> We think it plain that Congress never intended that those injured by governmental wrongdoers could be required, as a condition of recovery, to submit their claims to the government responsible for their injuries.

Felder, 487 U.S. at 142. There, it was argued that, only for § 1983 actions brought in state courts, civil rights plaintiffs should be required to satisfy Wisconsin's "notice-of-claim" statute. *Id.* at 135-36. This Court reversed the Wisconsin Supreme Court's ruling sustaining the requirement, rejecting numerous arguments asserting "sound notions of public administration" because they "necessarily clash with the remedial purposes of the federal civil rights laws." *Id.* at 145. This Court further noted that:

> The decision to subject state subdivisions to liability for violations of federal rights, however, was a choice that Congress ... made, and it is a decision that the State has no authority to override. Thus, ... the State's interest ... is patently incompatible with the compensatory goals of the federal legislation....

Id. at 143. It seems self-evident that a procedure established by a labor union as a precondition to pursuing its own economic interests, *Hudson*, 475 U.S. at 310 ("the constitutional requirements for the ... **collection** of agency fees") (emphasis added), is entitled to even less regard than a state scheme to which can be attributed at least the façade of "understandable or laudable ... State[] interest." *Felder*, 487 U.S. at 143.

Aside from this practical consideration, *Patsy*'s bar on exhaustion requirements is equally applicable to state and federal remedies. *Compare McCarthy v. Madigan*, 503 U.S. 140, 144 (1992), *with Patsy*, 457 U.S. at 501-02 & n.4. Petitioners proceed from an assumption unambiguously rejected by this Court in their assertion that "[b]ecause Congress has not clearly spoken on the matter, the question whether 'exhaustion of remedies' should be required in this context must be determined by this Court in accordance with 'sound judicial discretion.'" Pet. at 13, *citing McCarthy*, 503 U.S. at 144. Under § 1983, Congress has "clearly spoken," reaffirming "**categorically** that exhaustion is not a pre-requisite to an action under § 1983," policy considerations notwithstanding, and this Court has so held. *Patsy*, 457 U.S. at 500-01, 512-16 (emphasis added); *see Felder*, 487 U.S. at 146-50.

C. Petitioners maintain that whether a court should require exhaustion of an internal union process is an open, contentious issue in this context, because *Hudson*:

> did not expressly address the question presented here ..., the Court's statement that funds must be escrowed while challenges are pending "*before [the] impartial decisionmaker*" appears to contemplate that all objections will be presented to that decisionmaker; indeed, the Court did not describe any other mechanism for terminating the escrow of an objectors's funds.

Pet. at 7-8 (original emphasis).

To the contrary, in holding that the union's procedure in *Hudson* was constitutionally "inadequate because the [arbitra-

tor's] selection represents the Union's unrestricted choice," this Court noted that, even if both parties selected the arbitrator, "[t]he arbitrator's decision would not receive preclusive effect in any subsequent [42 U.S.C.] § 1983 [(1988)] action. *See McDonald v. [City of] West Branch*, 466 U.S. 284 (1984)." 475 U.S. at 308 & n.21. The Court was aware of Justice White's suggestion that "if the union provides for arbitration ... it should be entitled to insist that the arbitration procedure be exhausted before resorting to the courts," but chose not to accede to it. *Compare id.* at 311 (concurring opinion) *with id.* at 308-09 (opinion of the Court).[9] The Court's action clearly implies that, if the union alone opts for arbitration, that procedure cannot be required of nonunion employees.

As *Hudson* recognized by citing *McDonald*, compelled arbitration never can be appropriate, because arbitration cannot provide "an adequate substitute for a judicial proceeding in protecting ... federal statutory and constitutional rights." *McDonald*, 466 U.S. at 290. Even if the Ninth Circuit had not held that the teachers owe nothing to the unions owing to their failure to comply with *Hudson*, App. A at 16a, the teachers' claim that some of Petitioners' expenditures of their agency fees were not "necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative" raises issues under the First Amendment to the United States Constitution. *See Lehnert*, 500 U.S. at 522; *Ellis v. Railway Clerks*, 466 U.S. 435, 445-48, 455-56 (1984).

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[9] Even so, Justice White's concurrence lends no support to Petitioners. His suggestion that a union "should be entitled to insist that the arbitration procedure be exhausted before resorting to the courts," *Hudson*, 475 U.S. at 311, was premised upon the union's "compli[ance] with the other requirements specified in our opinion." This is a condition unmet by Petitioners here; they were adjudicated to have failed to comply with "the other requirements specified in [the Ninth Circuit's] opinion." App. A at 16a.

The district courts Congress created under Article III of the Constitution "have original jurisdiction of all civil actions arising under the Constitution [or] laws ... of the United States." 28 U.S.C. §§ 1331, 1337(a). Neither the First Amendment, nor the Civil Rights Act of 1871, nor any other statute authorizes this Court to prefer a class of litigants by delegating this jurisdiction to non-Article III decisionmakers independent of constitutional norms—union-approved "arbitrators" in agency-fee cases. Under Article III, to do so would be for the court to "abdicate its duty to determine by its own judgment the controversy presented...." *Kimberly v. Arms*, 129 U.S. 512, 514 (1889).

Therefore, Article III and the **Judicial Code** prohibit federal courts from deferring, on issues of law or fact, to "non-statutory arbitration conducted by a privately appointed decisionmaker" in agency-fee cases. *Bromley*, 82 F.3d at 692 (§ 1983 case); *cf. Stauble v. Warrob, Inc.*, 977 F.2d 690, 696-98 (1st Cir. 1992) ("nonconsensual reference of fundamental issues of liability ... for adjudication is not consonant with ... Article III"); *In re Bituminous Coal Operators' Ass'n*, 949 F.2d 1165, 1169 (D.C. Cir. 1991) (opinion by R. Ginsburg, J.) (same, in *mandamus* action); *Burlington N.R.R. v. Department of Revenue*, 934 F.2d 1064, 1073 (9th Cir. 1991) (same); *In re United States*, 816 F.2d 1083, 1092 (6th Cir. 1987) (same).

Clearly, if federal courts should not defer to a federal agency in agency-fee cases arising under the duty of fair representation, *Mulder*, 31 F.3d at 368-69, they should not defer to a private "arbitration" set up by the very union alleged to have violated nonmembers' constitutional rights. Indeed, a "procedure requiring an objector who challenges [an agency fee] to exhaust Union-provided arbitration violates [the] duty of fair representation by limiting the choice of forum for the challenge." *Abrams*, 59 F.3d at 1382.

Hudson did not suggest that "an expeditious arbitration might satisfy the requirement of a reasonably prompt decision by an impartial decisionmaker, so long as the arbitrator's selection did not represent the Union's unrestricted choice," 475 U.S. at

308 n.21, to oust the courts of jurisdiction in cases in which unions adopt an arbitration scheme. It merely "reject[ed] the Union's suggestion that the availability of ordinary judicial remedies is sufficient" to meet the union's special, independent responsibility itself "to provide procedures that ... facilitate a nonunion employee's ability to protect his rights." *Id.* at 307 n.20.

That is, to render an agency-shop arrangement arguably constitutional at all, a union must affirmatively establish a procedure for an expeditious decision by an "impartial decision-maker." But the Court clearly countenanced no notion that the union could compel nonunion employees to resort to such a procedure before seeking judicial relief.

To the contrary, *Hudson* "presume[d] that the courts remain available as the ultimate protectors of constitutional rights." *Id.* at 307 n.20. Creation of a scheme for an "impartial decision-maker" is thus a special duty *Hudson* imposed on unions solely to "**facilitate** a nonunion employee's ability to protect his rights," *id.* (emphasis added), if the employee chooses to avail himself of it. It is not a grant to unions of new powers over such employees. If nonunion employees believe, as the teachers do, that such a scheme does not facilitate, but rather impedes, their rights—and that it is, in fact if not in law, far from "impartial"—they remain free to seek "ordinary judicial remedies," *id.* *See Tierney v. City of Toledo*, 917 F.2d 927, 939-40 (6th Cir. 1990) (a requirement that nonunion employees exhaust arbitration before seeking judicial relief "unduly implies a limitation upon the [nonmembers'] constitutional rights"). To require otherwise converts the employees' shield under *Hudson* into a sword by which unions may separate employees from their right of access to the federal courts.

D. Even in the overly-narrow context in which Petitioners pigeon-hole this case, and contrary to the panel's and Petitioners' error ("'courts are divided on the issue' of 'whether nonmembers can be forced to arbitrate a union's chargeability determinations before seeking relief in federal court,'" Pet. at 6,

citing App. A at 16a), every court agrees with the Ninth Circuit that *Hudson* does not require exhaustion of agency-fee arbitration procedures. *Knight v. Kenai Peninsula Borough School District*, 131 F.3d 807, 816 (9th Cir. 1997), App. A at 18a; *see also Bromley*, 82 F.3d at 694; *Hohe v. Casey*, 956 F.2d 399, 408-09 (3d Cir. 1992); *Tierney*, 917 F.2d at 939-40; *Gibney v. Toledo Bd. of Educ.*, 532 N.E.2d 1300, 1303-05 (Ohio 1988); *cf. Abrams*, 59 F.3d at 1382 (under National Labor Relations Act); *Mulder*, 31 F.3d at 367-68 (same); *see also Brosterhous v. State Bar*, 906 P.2d 1242, 1251, 1255-58 (Cal. 1995) (no exhaustion required of attorneys challenging the amount of compulsory bar dues).

Only one court, under the Railway Labor Act, has reached a contrary conclusion. *Lancaster*, 76 F.3d at 1521-22. And in so doing, it seriously misreads this Court's decision in *Hudson*.[10]

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[10] The Tenth Circuit characterized it as "persuasive" *dicta* consistent with the majority's opinion, notwithstanding Justice White's self-conscious recognition that his concurrence (joined by Chief Justice Burger) was contrary to the majority's decision. The court also relied on the argument that absent exhaustion, "the procedure spawned by the Supreme Court [in *Hudson* would be] largely a waste of time and money," *citing* in *Bromley*, 843 F. Supp. at 1153, a decision later reversed by the Sixth Circuit. 82 F.2d at 693-94. Finally, like other courts, the district court disclaimed interest in or obligation to "micromanage the fee calculation." 76 F.3d at 1522; *cf.*, *Stauble v. Warrob*, 977 F.2d at 695 (rejecting an argument of "complexity" as "the same old whine in a different bottle"). We respectfully submit, however, that permitting the agency shop notwithstanding its inherent "impact upon ... First Amendment interests," *Abood v. Detroit Board of Education*, 431 U.S. 209, 222 (1977), obliges the federal courts scrupulously and without reticence to insure that nonmembers are not required to subsidize activities beyond those satisfying the "compelling state interest" which caused this Court to permit public employers to impose such an obligation. Having said that a line can be drawn, it is the solemn duty of the courts to draw that line. If courts are unwilling or unable to address such

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E. Where the circuits have conflicted is not as to "'whether nonmembers can be forced to arbitrate a union's chargeability determinations before seeking relief in federal court,'" Pet. at 6, *quoting* App. A at 16a, but rather, as to whether courts may refer, without the consent of the litigants, damage calculations in a civil rights action brought pursuant to § 1983 to non-Article III decisionmakers. *Hudson*, 922 F.2d at 1314; *Lowary*, 903 F.2d at 433.

These errant cases represent a distinct departure from this Court's jurisprudence regarding the responsibilities of an Article III court, *Schor*, 478 U.S. at 850; *see also Peretz*, 501 U.S. at 936 (litigants have "personal right to have an Article III judge preside over a civil trial"); *cf. Farrar v. Hobby*, 506 U.S. 103 (1992), constituting a distinct minority among the circuits applying this Court's decisions. *Pacemaker Diagnostic Clinic v. Instromedix*, 725 F.2d 537, 541 (9th Cir.) (*en banc*, opinion by Kennedy, J.) (citations omitted), *cert. denied*, 469 U.S. 824 (1984) ("federal litigant has a personal right ... to demand Article III adjudication of a civil suit"); *see also Stauble v. Warrob*, 977 F.2d at 694 (nonconsensual reference of liability issue to non-Article III adjudicator is constitutionally prohibited); *In re Bituminous Coal Operators' Ass'n*, 949 F.2d at 1168 (judge "**has no discretion** to impose on parties against their will 'a surrogate judge'") (emphasis added), *citing La Buy v. Howes Leather Co.*, 352 U.S. 249, 256 (1957) (party has a right to "trial before the court on basic issues involved in the litigation").

Hudson did **not** involve **any** question of nonunion employees being compelled to arbitrate a dispute over the amount of an agency fee. At issue was only the adequacy of the union's **notice** of its so-called "fair-share fee," not "the issue of the

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[10] (...continued)

constitutional issues, then the problem should be resolved at its root, by striking down the public-sector agency shop, rather than by abdication of judicial responsibility. *Cf. Machinists v. Street*, 367 U.S. 740, 795-96 (1963) (Black, J., dissenting).

accuracy of the fee itself." *See* 922 F.2d at 1309. Indeed, in the district court, the nonunion employees in *Hudson* settled part of the case by agreeing to a stipulated judgment that gave them an option to challenge the amount of the fee in the union's internal arbitration procedure. *Id.* at 1311.

On appeal, the court of appeals clearly stated the limited nature of the issue in *Hudson*. Quoting this Court's holding in *Hudson* that "the constitutional requirements for the [union's] collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending," the court of appeals explained that "[t]he [nonunion employees'] attack focuses on the **first** requirement: an adequate explanation of the basis for the fee." *Id.* at 1313 (emphasis added) (quoting *Hudson*, 475 U.S. at 310). And the question the court actually decided was "whether the **notice** gives the nonunion [employees] enough information to challenge the basis for the fee," and "sufficient information to enable the [employees] 'to decide whether there is any reason to mount a challenge'." *Id.* at 1314, 1316 (emphasis added).

So *Hudson* is no precedent for Petitioners' claim. As the Sixth Circuit concluded in *Bromley*, *Hudson* "did not hold that exhaustion of the arbitral remedy could be required as a condition to the bringing of a § 1983 action." 82 F.3d at 694. Moreover, **if** *Hudson* had held that exhaustion was required, it would have contradicted this Court's "categorical[ ]" holding that "exhaustion is not a prerequisite to an action under § 1983." *Patsy*, 457 U.S. at 500-01; *see Felder*, 487 U.S. at 146-50.[11]

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[11] It is hard to believe that, having been told by this Court in *Hudson* that "[t]he arbitrator's decision would not receive preclusive effect in any subsequent § 1983 action," 475 U.S. at 308 n.21, the lower courts on remand would cavalierly disregard that admonition, ignore *Patsy* and *Felder*, and require the nonunion employees to exhaust arbitration.

Although a bare precedent, *Lancaster* is highly unconvincing. First, *Lancaster* wrongly interpreted *Hudson* as having "held [that] a dissenting employee must exhaust all available nonjudicial remedies." It then "conclude[d that] the . . . holding in *Hudson* was correct" and "adopt[ed] it as the law of th[e Tenth] Circuit." 76 F.3d at 1521-22. Thus, *Lancaster* not only stands on a misreading of *Hudson*, but also defies this Court's decisions in *Patsy* and *Felder*.[12]

Second, *Lancaster* allowed the nonunion employee there to pursue his suit, though he had not exhausted the union's arbitration, because—like here—the union had earlier failed to provide a *Hudson* notice containing sufficient information about the nature of certain allegedly chargeable assessments. 76 F.3d at 1525-27. Thus *Lancaster* itself supports the conclusion that any case, such as this,[13] in which nonunion employees prove a defective notice (in addition to claims that an agency fee is unlawfully calculated) can properly begin in federal court. But why exhaustion of a union's arbitration scheme should come into play **after** a federal court has already asserted jurisdiction is not easy to imagine. *Cf. Beck v. Communications Workers*, 468 F. Supp. 87, 91 (D. Md. 1979) ("a stay pending exhaustion of the union rebate procedure would not be helpful in promoting the ultimate resolution of the controversy," because it "is extremely unlikely that exhaustion will substantially alter the positions of the parties").

Moreover, such a proceeding would meet a need for adjudication obviated here by the Ninth Circuit's express

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[12] It also is distinguishable because the case was brought pursuant to the Railway Labor Act, 45 U.S.C. § 151, *et seq.*

[13] The teachers obtained a judgment that "the explanation provided to the nonmembers, along with the supplemental mailing, was deficient." App. A at 16a. Thus, even under *Lancaster*, exhaustion was not required here.

determination that the unions were "not entitled to the fees it collected." App. A at 16a.

Further, Petitioners overstate the case by claiming that "the Ninth Circuit acknowledged that this case presents the same issue as is pending before this Court in *Miller*." Pet. at 6. To the contrary, the panel merely agreed with the D.C. Circuit's conclusion that nonmembers cannot be forced to participate in an internal union process to adjudicate their constitutional claims.

This is highlighted by the distinctly different factual context in which this case arose, one in which the district court declined to adjudicate damages and that calculation to adjudication pursuant to Petitioners' nonconsensual, internal process. App. C at 46a; App. D at 60a-61a.

F. Even if *Hudson* could be read to have left debatable whether nonunion employees can be compelled to use an "arbitration" in which "the arbitrator's selection did not represent the Union's unrestricted choice," 475 U.S. at 308 n.21, (which the teachers deny), the record here is not suited for resolution of that issue. *Hudson* expressed deep concern with a union's unilateral selection of an "arbitrator," finding such a scheme unconstitutional under the First Amendment "because the selection represents the Union's unrestricted choice from the state list." 475 U.S. at 308.

In *Hudson*, "the Union President . . . select[ed] an arbitrator from a list maintained by the Illinois Board of Education." *Id.* at 296. Here, the unions have selected the AAA as its intermediary. Under its procedure, **at the union's request**, the AAA appoints an arbitrator in accordance with its rules. App. E at 61a.

This is a procedural distinction without a practical difference. In both cases, the union selected **the list** from which **someone other than the nonunion employees** chose the "arbitrator." As one court of appeals observed, "It may well be ... that the arbitrators chosen by the AAA from a group 'experi-

enced in labor matters' would not be perceived as typically sympathetic to [the teachers] (or their counsel)." *Miller*, 108 F.3d at 1421. It strains credulity to the breaking point to believe that Petitioners employ the AAA's "special panel of arbitrators experienced in employment relations" for a reason other than that it considers those individuals friendly to its position, and that the AAA's participation constitutes the **minimum** necessary to comply with that aspect of *Hudson*'s mandate.

In any event, however, the record does not show whether in practice Petitioners' scheme amounts to "the Union's unrestricted choice," because of the attitudes of the "special panel of arbitrators," or somehow might be deemed as fair as a mutual choice of the arbitrator by both Petitioners and the teachers. The record also does not show how the special panel is selected or what say, if any, unions have in that selection.

Thus, any attempt to resolve this issue now would entangle this Court in a purely hypothetical case.[14] The teachers submit that, as a matter of First-Amendment law, a court can impose no arbitration on nonunion employees in an agency-fee dispute; but, if arbitration can be required, it surely must provide for **mutual** selection of the actual arbitrator by the union **and the nonunion employees**, not simply by the union through the union's self-servingly selected surrogate. "By definition, an arbitrator must be a person chosen by mutual agreement." The "essential

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[14] Some courts have held that the AAA's procedure satisfies *Hudson*'s requirement for an "impartial decisionmaker." *E.g., Damiano v. Matish*, 830 F.2d 1363, 1372 (6th Cir. 1987). These opinions, though, dealt only with the situation in which nonunion employees might **voluntarily** use such a scheme. The AAA's procedure might arguably comport with *Hudson*, but only because nonunion employees could still bring their claims to court. To the extent that Petitioners might argue that these cases support **compelled** arbitration, they are neither binding nor persuasive—because in this case there is no record as to whether the AAA's procedure is, in fact, as fair as mutual selection of the arbitrator. *See United Transportation Union v. State Bar*, 401 U.S. 576, 583 (1971).

element of arbitration" is "that the selection of the particular arbitrator or the method of selection of an arbitrator be established by mutual agreement between the parties." *Bethlehem Mines Corp. v. Mine Workers*, 344 F. Supp. 1161, 1165 (W.D. Pa. 1972), *aff'd*, 494 F.2d 726 (3d Cir. 1974); *see Associated Plumbing & Mechanical Contractors v. Plumbers Local 447*, 811 F.2d 480, 483-84 (9th Cir. 1987).

Therefore, to argue its case, the unions must show—contrary to the record, App. E at 61a—that, in fact, the AAA's procedure is the practical equivalent of mutual selection of a true arbitrator.[15] The unions' only other recourse is to contend that, even assuming the AAA's procedure is **not** the practical equivalent of mutual selection, nevertheless the procedure passes muster under the First Amendment. But this Court has already decided this issue adversely to the unions, in *Hudson*, where it held that "review by a Union-selected arbitrator ... is ... inadequate" under the First Amendment. 475 U.S. at 308 (footnote omitted).

Thus, a writ of *certiorari* is unwarranted here because the factual record arguably necessary to bring the unions' procedure outside the condemnation of *Hudson* is deficient; and constitutional questions should never be decided in a factual vacuum.[16] *See, e.g., Abood*, 431 U.S. at 236 n.33. At the same time, a writ

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[15] The district court's holding that the teachers were not entitled to mutual selection was wholly gratuitous as, the unions' misrepresentations to the contrary notwithstanding, the teachers did not seek such authority. They maintain, however, that describing Petitioners' "impartial decisionmaker" process as "arbitration" is misleading and inaccurate, because it is not the product of mutual consent.

[16] This Court should wait for a case in which either "the arbitrator's selection [does] not represent the Union's unrestricted choice," *Hudson*, 475 U.S. at 308 n.21, in any sense, or in which there is a record as to whether or not a scheme such as Petitioners' amounts, in practice, to such an "unrestricted choice."

is not warranted because *Hudson* has already ruled adversely to the unions on the fundamental constitutional question.

G. Presumably because they find little support for their position in *Hudson* and in exhaustion cases, Petitioners argue that they are not attempting to impose an exhaustion requirement at all. Rather, they say, there is a ripeness problem, because "a nonmember may not bypass a union's agency fee arbitration process and then mount a First Amendment challenge to the fee." Pet. at 13. They base this argument upon the notion that "the essence of a cognizable First Amendment claim in the agency fee context is 'that a union has utilized an individual agency-shop agreement to force dissenting employees to subsidize ideological activities.'" Pet. at 15, *citing Lehnert*, 500 U.S. at 516.

This extraordinary statement is in studied disregard of the law. Petitioners' "ripeness" argument misrepresents *Hudson*. A First-Amendment violation occurs when a union spends objecting nonmembers' agency fees on nonbargaining activities. However, a violation of the right not to be deprived of property without due process **also** occurs when a union **collects** agency fees without having in place a procedure that satisfies the Constitution, in all respects, even if the union escrows all contested fees. *See, e.g., Weaver v. University of Cincinnati*, 942 F.2d 1039, 1045-46 (6th Cir. 1991).

Hudson prescribed "constitutional requirements for the Union's **collection** of agency fees." 475 U.S. at 310 (emphasis added). These requirements were not imposed merely to prevent improper spending, as the unions argue. They also were imposed to "provide the protections necessary for any **deprivation of property**" and "to minimize both the impingement [of the agency shop itself on nonmembers' First-Amendment interests] and the burden" of objection. *Id.* at 304 n.13, 309 (emphasis added).

The Court explicitly rejected the argument "that because a 100% escrow completely avoids the risk that dissenters' contributions could be used improperly," there is no constitu-

tional violation. The Court held that the *Hudson* "plaintiffs established a constitutional violation," because the union's procedure "remains flawed in two [other] respects": the lack of "an adequate explanation for the advance reduction of dues" and "a reasonably prompt decision by an impartial decisionmaker." *Id.* at 309 & n.22.

Hudson also reiterated the Court's earlier holding in RLA cases and *Abood* that the "nonmember's 'burden' is **simply** the obligation to make his objection known." *Id.* at 306 n.16 (emphasis added). Those earlier cases also held that an objection may be made for the first time "in [a] complaint filed in [a civil] action." *Allen*, 373 U.S. at 119 n.6; *accord Abood*, 431 U.S. at 239 & n.39. And, *Hudson* emphasized that the union has "a responsibility to provide procedures that **minimize** th[e] impingement [of the agency shop on First-Amendment rights] and that **facilitate** a nonunion employee's ability to protect his rights." *Id.* at 307 n.20 (emphasis added).

It necessarily follows that a union's procedure is invalid—and a claim that the union has unlawfully collected agency fees is ripe for judicial determination—where the union's procedure fails to include one of the three required *Hudson* procedural safeguards (*i.e.*, notice, independent decisionmaker, and escrow) **or** includes some other element that imposes an impermissible condition on nonmembers' exercise of their right to challenge its calculation of chargeable expenses.

For example, under the NLRA and RLA, "the only aspect of union membership that can be required pursuant to a union shop agreement is the payment of dues." *Pattern Makers' League v. NLRB*, 473 U.S. 95, 106 n.16 (1985); *see Beck*, 487 U.S. at 744-45; *Railway Employes' Dep't v. Hanson*, 351 U.S. 225, 235-38 (1956). Thus, clearly, a union could not lawfully condition exercise of the right not to subsidize its nonbargaining activities, or the right to challenge its calculation of bargaining costs, upon full membership.

Here, Petitioners attempt to condition exercise of both rights on compliance with an aspect of full union membership: use of

a union-created remedy, *see, e.g., Neal v. System Bd. of Adjustment*, 348 F.2d 722, 726 (8th Cir. 1965). Petitioners have demonstrated no consensual or federal statutory source of authority for that requirement.

Thus, by attempting to impose that condition in its procedure, Petitioners have invalidated the procedure and infringed on the teachers' First-Amendment rights by demanding and/or collecting agency fees from them, independent of the other deficiencies already adjudicated. As the court of appeals held in *Abrams*, a union's agency-fee procedure "requiring an objector who challenges the allocation of chargeable and non-chargeable expenses to exhaust Union-provided arbitration violates its duty of fair representation by limiting the choice of forum for the challenge." 59 F.3d at 1382; *see also Bromley*, 82 F.3d at 694 ("it is [not] constitutional for an agency shop agreement to require objecting employees to exhaust their arbitration remedies before going into court on their constitutional claims"); *Hohe*, 956 F.2d at 408-09 (a state requirement of exhaustion of public-sector union agency-fee procedures "is constitutionally unenforceable").

Likewise, *Williamson County Regional Planning Commission v. Hamilton Bank*, a case Petitioners cite for this inventive argument, shows that they confuse two "conceptually distinct" questions: "whether administrative remedies must be exhausted" and "whether an administrative action must be final before it is judicially reviewable," 473 U.S. 172, 192 (1985):

> [T]he finality requirement is concerned with whether **the initial decisionmaker** has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek **review of an adverse decision and obtain a remedy** if the decision is found to be unlawful or otherwise inappropriate.

Id. at 193 (emphasis added).

Here, Petitioners are the "initial decisionmaker[s]" and "arrive at a definitive position" on the chargeability issue. When the unions distribute their notice, they have finally determined what percentage of dues they will demand of teachers who object to paying for nonbargaining activities and what they will spend, despite those objections, if the teachers do not seek review of their determination. The "impartial decisionmaker" does not participate in that decision. And, that decision "inflicts an actual, concrete injury." Dues are demanded of and/or collected from teachers based on the unions' determination, upon pain of discharge for nonpayment, thus depriving the teachers of possession of part of their wages.

On the other hand, *Hudson* describes the "impartial decisionmaker" procedure as a "review procedure" and a "remedy." 475 U.S. at 307-08 & nn.19-21. And so it is in practice. The "arbitrator" determines whether the unions validly calculated the agency fee charged objectors and orders a remedy: restitution of any portion of the fee that he finds was not lawfully collected.

Therefore, *Williamson County* confirms that the Ninth Circuit correctly held that exhaustion of Petitioners' "arbitration" procedure is not required. The claim in that case was not ripe, because the property owner had not asked the Planning Commission to grant a variance and, thus, the Commission had not yet made "a conclusive determination ... whether it would allow [the property owner] to develop the subdivision in the manner [the owner] proposed." 473 U.S. at 193. In short, in contrast to this case, there had occurred no taking or threat of taking.

However, in *Williamson County*, there were two other procedures, similar to the "impartial decisionmaker" procedure here, that the Court held need **not** be used before the claim was ripe for judicial determination. The "State provide[d] procedures by which an aggrieved property owner may seek a declaratory judgment regarding the validity of zoning and planning actions taken by county authorities." The Court held

that the property owner "would not be required to resort to those procedures before bringing its § 1983 action, because those procedures clearly are remedial." It also held that the owner "would not be required to appeal the [Planning] Commission's rejection of [a] preliminary plat to the Board of Zoning Appeals, because the Board was empowered, at most, to review that rejection, not to participate in the Commission's decision-making." *Id.*[17]

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[17] The other cases Petitioners cite are wholly inapposite. *Cox v. New Hampshire*, 312 U.S. 569 (1941), and *Poulos v. New Hampshire*, 345 U.S. 395 (1953), held merely that government can require the obtaining of a license for the use of public property if the licensing agency makes only ministerial time, place, and manner determinations. *See Poulos*, 345 U.S. at 402-05; *Cox*, 312 U.S. at 575-76. The public **owns** the public streets and parks and, as proprietor, may make reasonable regulations for their use. Petitioners have no authority over nonmembers that justifies requiring them to seek a license from it through its "arbitration" scheme as a precondition to asserting in court their constitutional and statutory right to get back their own money. Moreover, *Poulos* recognized that government cannot require the obtaining of a license as a precondition to exercising First-Amendment rights where the licensing agency—like the "arbitrator" here—has discretion to make content-based determinations. *See* 345 U.S. at 403 n.9, 412-14. *Times Film Corp. v. City of Chicago* held only that a permit may be required to protect the public "against the dangers of obscenity in the public exhibition of motion pictures," because "'obscenity is not within the area of constitutionally protected speech,'" and motion pictures are "not 'necessarily subject to the precise rules governing any other particular method of expression.'" 365 U.S. 43, 49-50 (1961) (quoting *Roth v. United States*, 354 U.S. 476, 485 (1957), and *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)). Here, in contrast, the collection of agency fees even for bargaining purposes indisputably infringes on First-Amendment interests. *See Hudson*, 475 U.S. at 301 n.8, 307 & n.20; *Ellis*, 466 U.S. at 455; *Abood*, 431 U.S. at 222 (opinion of the Court), 255 (Powell, J., concurring). Nor does this case concern motion pictures.

CONCLUSION

Petitioners present no cogent reason for a writ of *certiorari* in this case. The court of appeals' decision correctly followed the applicable decisions of this Court. Petitioners suggest no conflict among the courts of appeals, and no real conflict exists. Therefore, Petitioners' petition should be denied. If a writ of *certiorari* is granted, the court of appeals' decision should be summarily affirmed.

Respectfully submitted,

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8 April 1998